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Nos. 89-1502, 89-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN STOCK EXCHANGE, INC., CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED, THE OPTIONS CLEARING CORPORATION, AND PHILADELPHIA STOCK EXCHANGE, INC.,

Petitioners,

v.

CHICAGO MERCANTILE EXCHANGE, BOARD OF TRADE OF THE CITY OF CHICAGO, INVESTMENT COMPANY INSTITUTE, AND SECURITIES AND EXCHANGE COMMISSION,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CHICAGO MERCANTILE EXCHANGE AND BOARD OF TRADE OF THE CITY OF CHICAGO

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that the instruments known as Index Participations are stock index futures contracts and therefore subject to the exclusive regulatory jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act?

LIST OF PARTIES

The parties in the Court of Appeals were:

The Chicago Mercantile Exchange
The Board of Trade of the City of Chicago
The Philadelphia Stock Exchange, Inc.
The American Stock Exchange, Inc.
The Options Clearing Corporation
The Chicago Board Options Exchange
The Investment Company Institute
The Securities and Exchange Commission
The Commodity Futures Trading Commission
(as *amicus curiae*)

Pursuant to this Court's Rule 29.1, respondents Chicago Mercantile Exchange and Board of Trade of the City of Chicago state that they are membership corporations and are wholly owned by their members. They have no parent corporations and no subsidiaries which are not wholly owned by them.

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CHICAGO MERCANTILE EXCHANGE AND BOARD OF TRADE OF THE CITY OF CHICAGO

Respondents Chicago Mercantile Exchange ("CME") and the Board of Trade of the City of Chicago ("Board of Trade") oppose the certiorari petitions filed by the American Stock Exchange, Inc. ("AMEX"), Chicago Board Options Exchange ("CBOE"), and The Options Clearing Corporation ("OCC") in No. 89-1502 and the Philadelphia Stock Exchange, Inc. ("PHLX") in No. 89-1503. The CME and Board of Trade file this consolidated brief in opposition.

The petitions provide no adequate reason for this Court to grant certiorari and should be denied because:

1. The Seventh Circuit's decision is correct. Index Participations ("IP's") are stock index futures contracts subject to the exclusive regulatory jurisdiction of the Commodity Futures Trading Commission ("CFTC") under the Commodity Exchange Act. As such, the CFTC's jurisdiction over IP's supersedes any authority the Securities and Exchange Commission ("SEC") might otherwise have had.

2. Petitioners grossly exaggerate the consequences of the Seventh Circuit decision. The decision neither blurs the distinctions between securities and futures contracts nor stifles innovation in the financial markets.

3. The policy issue raised by the petitions—whether the CFTC should continue to have exclusive jurisdiction over stock index futures—is currently under active review by Congress. Congress chose to give the CFTC this exclusive jurisdiction and Congress alone should decide whether to adjust this jurisdictional assignment.

RELEVANT STATUTES

Pursuant to Section 2(a)(1)(A) and (B) of the Commodity Exchange Act, 7 U.S.C. §§ 2, 2a (Joint Appendix of Petitioners ("App.") 112-119), the CFTC has exclusive jurisdiction over all futures contracts, including specifically stock index futures.

Under Section 9(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(g) (App. 120), the SEC has exclusive jurisdiction over stock index options.

The definition of "security" is found in Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (App. 119-120).

STATEMENT OF THE CASE

Proceedings Below

During 1988, PHLX, AMEX, and the CBOE filed with the SEC proposed rule changes seeking SEC approval to trade IP's. During each of the public comment periods on the proposed rule changes, the CFTC advised the SEC that the CFTC had determined that IP's were stock index futures within the CFTC's exclusive jurisdiction and that the SEC lacked authority to regulate IP's. The CME and Board of Trade filed similar objections.

The SEC's Decision

Notwithstanding the CFTC's view, the SEC concluded that it had jurisdiction over IP's primarily because the SEC found that IP's sufficiently resembled stock to constitute "stock" within the definition of "security" in Section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. § 78c(a)(10), App. 49-52. In addition, the SEC deemed an IP to be a "security" under other components of the statutory definition of that term. *Id.* at 50, 52. Although urged to do so by AMEX, the SEC did not adopt the view that IP's were stock index options, a type of security over which Congress had vested exclusive jurisdiction in the SEC. *Id.* at 52 n. 57.

Giving no weight or deference to the CFTC's determination, the SEC also ruled that IP's were not stock index futures contracts. Instead of relying upon the CFTC's construction of its enabling statute, the SEC issued its own different construction of the Commodity Exchange Act and ruled that IP's lack the "futurity" and "bilateralism"

that the SEC decided were requisites of futures contracts. App. 53-63.

The Court of Appeals Decision

The CME and Board of Trade petitioned for review to the Seventh Circuit, where the CFTC appeared as *amicus curiae*. The Seventh Circuit unanimously set aside the SEC's order because the SEC lacked jurisdiction over IP's. Having analyzed both the SEC's and CFTC's interpretations of the relevant statutes as applied to IP's, the Court of Appeals held that the CFTC had exclusive jurisdiction over IP's.

Initially, the Court of Appeals disposed of the SEC's claim that IP's were akin to "stock." App. 14-15. The Court of Appeals emphasized:

> IPs are not stock *in* anything. . . . Stock is an equity interest in an issuer, the residual claim to the profits of a venture. . . . Purchasers of IPs don't own equity, directly or indirectly. . . . *Id.*; emphasis in original.

Moreover, the Seventh Circuit observed that, although IP's "do not fit comfortably into the other pigeonholes of [the definition of security in] § 3(a)(10)," there was a "basis for drawing IPs within § 3(a)(10), even though they do not duplicate a recognized category." *Id.* at 15.

The Court of Appeals next analyzed whether IP's were futures contracts, as the CFTC maintained. First, the Seventh Circuit dismissed the SEC's claim that IP's lacked the "futurity" of futures contracts.

> [T]he SEC is wrong. IPs are no more a "present obligation to pay current value" than are futures contracts. The holder of either an IP or

> a stock-index futures contract may go to market and trade it; the price necessarily tracks current value. App. 16.

The Court of Appeals considered IP's and futures from the perspectives of the buyers (longs) and sellers (shorts). The Court of Appeals found that "from the long's point of view, IP and futures contract ultimately look the same" (*id.* at 17), while "[s]horts on IPs make the same pledge as shorts on stock index futures contracts. . ." (*id.* at 16). Upon completing this analysis, the Court of Appeals noted the conflicting agency interpretations and reasoned:

> If each agency's interpretation of its own statute is entitled to some deference, then the IP is both a security and a futures contract. It has some attributes of both, and all attributes of neither, as we have laid out in excessive detail. Neither characterization can be called wrong. *Id.* at 20.

The Court of Appeals then applied the exclusive jurisdiction provision in Section 2(a)(1)(B)(ii) of the Commodity Exchange Act, 7 U.S.C. 2a(ii), and held that the SEC had no jurisdiction to approve or regulate IP's:

> An instrument either is or is not a futures contract. If it is, the CFTC has jurisdiction; if it is not, the CFTC lacks jurisdiction; if the CFTC has jurisdiction, its power is exclusive. *Id.* at 21.

The Court also explained that if IP's were stock index options, the SEC's authority over those instruments could have trumped the CFTC's exclusive jurisdiction. *Id.* at 14. Like the SEC and CFTC, the Court of Appeals did not find IP's to be options. *Id.* at 17-18. Thus, the Court

of Appeals set aside the SEC's order approving IP's for trading on the securities exchanges.

Stock Index Futures Contracts

Stock index futures contracts extend the traditional futures contract functions—hedging and speculating—to an index of prices of publicly traded stocks. Stock index futures have the following basic characteristics:

1. The purchaser (long) and seller (short) enter into a contract based on the value of a stock index at a specified future date (the settlement or delivery date).
2. Neither the long nor the short owns the stock comprising the index.
3. The long or short may close out or cancel the stock index futures position on any trading day by an "offsetting" or "opposite" transaction with any other trader. The long would sell a sufficient number of futures to cover the contracts previously purchased, and conversely the short would purchase the same number of contracts previously sold.
4. Through these offsetting transactions, the long will profit from a rise in the index value compared to the initial contract price, and conversely the short will profit from a fall in the index value.
5. If the futures contract is not offset by the settlement or delivery date, the long or short will pay or receive the cash difference between the initial purchase price of the contract and the value of the contract on the last day of trading. (Physical delivery of the stocks in the index

> is prohibited under 7 U.S.C. § 2a(ii)(I).) Again, a long profits from an increase in the index value; a short profits from a decline in index value.[1]

Thus, as this Court noted in *Merrill Lynch, Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 358 (1982), "[t]he purchase or sale of a futures contract on an exchange is . . . motivated by a single factor—the opportunity to make a profit (or to minimize the risk of loss) from a change in the market price."

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[1] *See* the discussion of stock index futures in Katzenbach, An Overview of Program Trading and Its Impact on Current Market Practices 6-9 (1987) ("Katzenbach Study"); Board of Governors of the Federal Reserve System, CFTC, and SEC, A Study of the Effects on the Economy of Trading in Futures and Options, Chap. II, pp. 1-33 (1984). The Katzenbach Study (pp. 7-8) gave examples of how stock index futures operate:

> The use of index futures is relatively simple. For example, the popular S&P 500 index future is a contract to buy or sell the value of the S&P 500 Index multiplied by $500. Thus, if the value of the S&P 500 Index were 245, one contract would be worth $122,500 (value of the index [245] multiplied by $500). The index futures contract specifies that settlement in cash must occur upon the termination of the contract, with the settlement being the difference between the contract price and the actual level of the stock index at the expiration of the contract. Thus, if an investor entered into a futures contract to buy a contract of the S&P 500 Index at a specified future date at 245, and the S&P 500 Index is 249 on that future date, the investor would gain $2,000 ($500 multiplied by the gain of 4). If the investor entered into a futures contract to sell an S&P 500 futures contract at the contract price of 245 and the S&P 500 Index is at 249 on that future date, the investor would lose $2,000 ($500 multiplied by a loss of 4).

Stock Index Participation Contracts

IP's have the following basic characteristics:

1. The purchaser (long) and seller (short) enter into a contract based on the value of a stock index at a specified future date (the cash-out date).
2. Neither the long nor the short owns the stocks comprising the index.
3. The long or short may close out or cancel their IP positions on any trading day by an "offsetting" or "opposite" transaction with any other trader. The long would sell a sufficient number of IP's to cover the contracts previously purchased, and conversely the short would purchase the same number of contracts previously sold.
4. Through these offsetting transactions, the long will profit from a rise in the index value compared to the initial contract price, and conversely the short will profit from a fall in the index value.
5. If the IP is not offset by the cash-out date and the long decides to end the agreement on the cash-out date, the long or short will pay or receive the cash difference between the initial purchase price of the IP and the value of the IP on the cash-out date. Again, a long profits from an increase in the index value; a short profits from a decline in the index value. If offset or cash-out does not occur by the end of each calendar quarter, then the IP long is credited and the IP short is debited for dividend equivalency payments resembling the dividends the IP long would have re-

> ceived had he owned the stock. This payment, of course, is reflected in the IP's market price.[2]

As with stock index futures, the purchase or sale of an IP is motivated by a single factor—to make a profit or minimize the risk of loss from a change in the market price.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS CORRECT.

The Court below correctly decided (1) that IP's are futures contracts under the CFTC's exclusive jurisdiction, and (2) that IP's are not stock index options within the SEC's jurisdiction.

A. IP's Are Futures Contracts.

In 1982, the SEC and CFTC agreed that the CFTC should have exclusive regulatory jurisdiction over stock index futures. To that end, the agencies jointly proposed, and Congress enacted, legislation which provides that:

> Notwithstanding any other provision of law— . . .
>
> (ii) This chapter shall apply to and the [CFTC] shall have exclusive jurisdiction with respect to . . . transactions involving, and may designate a board of trade as a contract market in, *contracts*

[2] Each of the petitioning exchanges added features to its own IP without changing the common economic essence. PHLX would permit cash-out at the end of each quarter without penalty and cash-out at 99.5% of the next day's closing index value at any other time. CBOE would allow semiannual cash-out by either the long or the short. AMEX would permit only quarterly cash-out but would provide the alternative of actual delivery of the underlying stock to settle the IP's, under restrictive conditions.

> *of sale . . . for future delivery of a group or index of securities (or any interest therein or based upon the value thereof). . . .* 7 U.S.C. § 2a, App. 116-117; emphasis added.

Thus, if IP's are stock index futures contracts, or contracts of sale for future delivery of the value of an index of securities, the SEC had no jurisdiction to approve IP's.

As the Court of Appeals ruled, IP's are futures contracts. Like other stock index futures, IP's are instruments that allow the parties to speculate on the future value of a group of stocks, without owning the stocks. App. 14-17. In assessing the common economic substance of futures and IP's, the Court of Appeals found:

> Shorts on IPs make the same pledge as shorts on stock-index futures contracts: to pay the value of an index on a prescribed day (the expiration date for the futures contract, the cash-out date for the IP). . . . Even from the long's point of view, IP and futures contracts ultimately look the same. The long pays up front for the IP, but the long on a futures contract *promises* up front to make a defined payment on the settlement date; the difference in the timing of the payment does not affect the fact that valuation comes at the defined future date. *Id.* at 16-17; emphasis in original.

The economic reality of IP's thus compelled the Court of Appeals to find IP's to be stock index futures.

The Court of Appeals focused on the economic substance of IP's in keeping with the interpretive principles set down by this Court in deciding what is a security. Under these principles, "we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation." *Reves v. Ernst & Young*, ___ U.S. ___, 110 S.Ct. 945, 949 (Feb. 21, 1990). The Court

of Appeals reasoned that "[i]f the interpretive approach is proper for the securities acts, it is no less proper for the futures acts." App. 23. Under these principles, the Court of Appeals disregarded form for substance in finding IP's to be futures and correctly rejected the SEC's formalistic approach to defining futures—an approach that would have created a serious regulatory gap under the Act. *Id.* at 24.

Unable to refute the Court of Appeals' conclusion that IP's are futures, petitioners first try to recast IP's and then misconstrue the Court of Appeals' decision. Contrary to petitioners' descriptions, IP's are not "market baskets of common stock" (AMEX Pet. at 13) or a "market basket security" (PHLX Pet. at 3). To reiterate what the Court of Appeals emphasized, "IP's are not stock *in* anything." App. 14; emphasis in original. IP purchasers do not own a market basket of stocks; indeed, as the Court of Appeals noted, unlike stocks "IP's don't carry votes because they don't have anything to do with equity." *Id.* at 15.

Petitioners also contend that under the Court of Appeals' holding any financial instrument for which value is "realized" (PHLX Pet. at 7) or "received" (AMEX Pet. at 20) at a future date has "futurity" and is therefore a futures contract. Based on this contention, petitioners argue that the decision below creates uncertainty over whether traditional securities including stocks and bonds as well as new types of securities are subject to SEC or CFTC jurisdiction. This uncertainty does not exist.

The Court of Appeals found an IP to be a futures contract because (1) an IP's value depended upon the ongoing market assessment of the value that the stock index would have on a "prescribed" or "defined" future date (App. 16-17) and (2) IP's do not convey an ownership interest in the stock in the index. *Id.* at 14-15. Far from the novel

pronouncement petitioners claim, the Court of Appeals' decision merely adopts the concept of futurity and the definition of a futures contract set forth in the only other appellate case addressing these issues, *CFTC v. Co Petro Marketing Group, Inc.*, 680 F. 2d 573 (9th Cir. 1982). Under this ruling, as the Court of Appeals explained, an instrument is a futures contract if its "value depended entirely on the price of the commodity at [its] expiration date, and [it was] not formed in contemplation of physical delivery." App. 21.

The focus of the Courts of Appeals on ownership or physical delivery in determining whether an instrument is a futures contract is grounded in the statute. Congress mandated under the Commodity Exchange Act that "future delivery" does "not include any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2, App. 113. Under the law as applied by the Court of Appeals, therefore, the actual sale of a stock or bond cannot be for future delivery, notwithstanding petitioners' hyperbole to the contrary (PHLX Pet. at 8; AMEX Pet. at 20).

Application of the Court of Appeals' true principles to the parade of horribles portrayed by petitioners turns that parade into an apparition. Purchasers of stocks or bonds own the underlying securities; purchasers of stock index futures and IP's do not. Stock and bond purchasers also hope their investments will appreciate in value by an unspecified date in the future; longs and shorts in stock index futures or IP's are speculating that the value of a stock index will increase (or decrease) by a specified future date. Accordingly, under the Court of Appeals' decision, *when* a purchaser or seller of a futures contract receives value is meaningless. What counts is whether the instrument is structured to provide the market participants with an opportunity to speculate on or hedge

against price changes based upon the market's ongoing assessment of the instrument's value tied to a specified future date.[3]

In sum, petitioners fail to recognize the fundamental difference between changes in an asset's value over time and the "futurity" of a futures contract that ties the instrument's valuation to a specified future date. Therefore, petitioners' concern that the Court of Appeals has created a broad new definition of "futurity" is completely unfounded.

Petitioners also complain that IP's are not strictly "bilateral." (PHLX Pet. at 10-11; AMEX Pet. at 19.) The Court of Appeals correctly dismissed this contention (App. 21) because "bilateralism is not essential to a futures contract," citing *CFTC v. Co Petro Marketing Group, Inc., supra.*

The asserted missing bilateralism stems from certain superficial payment differences in IP's and stock index futures. Upon entering into an IP, the long pays for the IP in full or pays in full a margin deposit equal to 50% of the IP's then current value. App. 81. Upon entering into a stock index futures contract, the long pays in full

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[3] This distinction between ongoing *valuation* tied to a future date and delayed *receipt* of value explains why PHLX's next-day cash-out alternative does not deprive IP's of futurity. PHLX allows an IP long to decide on one day to receive 99.5% of the IP's *next-day's* closing index value. Thus, when the long buys the IP and when he decides to cash out, he still cannot know what the IP's cash-out value will be.

Moreover, an IP's dividend equivalency payment does not distinguish an IP from a future. The value of the credit to the long or debit to the short for this pseudo-dividend is factored into the overall market value of an IP. Similarly, actual dividends declared and paid on the stocks in a stock index are taken into account by those trading the futures contract on that index.

the required margin deposit of approximately 10-15% of the then current value of the futures contract. As the Court of Appeals notes, this formalistic difference is meaningless because it "does not affect the fact that valuation comes at the defined future date." App. 17.

In other words, if an index futures long paid margin reflecting 50% or 100% of the then current value of the index, that would not transform the futures contract into a security.[4] The futures contract would remain a futures contract, regardless of the size of the margin payment, unless the long acquired the stock in the index upon entering into the contract and the contract's value was not tied to a defined future date. IP's do not have these characteristics. Thus, the Court of Appeals correctly found IP's to be futures.

B. IP's Are Not Options or Privileges.

AMEX (but not PHLX) has contended throughout that IP's are stock index options within the SEC's jurisdiction under 15 U.S.C. § 78i(g), App. 120. Options, however, have a settled business and legal definition: the buyer pays a "premium" to acquire the right, but not obligation, to buy the stock from the seller at the "strike" or "exercise" price. The instrument is termed an "option" because the buyer has the alternative not to consummate the purchase of the underlying stock if its market price falls below the "strike" price. An option is thus a limited risk investment because only the premium is lost if the option is not exercised. *See Deutschman v. Beneficial Corp.*, 841 F.2d 502, 504 (3d Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.

[4] Recently, the Commodity Exchange, Inc. called for 100% margin for its April copper futures contract. "Comex moves to avert squeeze on copper futures," *Financial Times*, p. 30, April 25, 1990. No one would seriously argue that 100% margin caused the copper futures contract to become a security.

Ct. 3176 (1989); *Laventhall v. Gen'l Dynamics Corp.*, 704 F.2d 407, 410-411 (8th Cir.), *cert. denied*, 464 U.S. 846 (1983). AMEX attempted to force IP's into the option definition by labeling the *full* purchase price paid by the long as the "premium," thus making the "strike" or "exercise" price *zero*, and by arguing that the long had the "option" *never* to exercise it, thereby forfeiting the entire amount paid up front. However, the SEC did not find that IP's are options, App. 52 n. 57, and the Court of Appeals emphatically rejected the contention, *id.* at 18.

AMEX, the CBOE, and CCC (but again not PHLX) attempt to recycle the rejected "option" argument by using the word "privilege" instead, one of several option synonyms ("put," "call," and "straddle" are the others) appearing in both the futures and securities statutes. Petitioners contend that use by Congress of several different "option" terms "suggests" that each has different attributes. (AMEX Pet. at 23.) In fact, "privilege" traditionally has been used merely as a generic synonym for "option." *See, e.g., Trusler v. Crooks*, 269 U.S. 475, 481 (1926).[5] Petitioners, indeed, make no showing that "privilege" means anything other than "option." Petitioners offer no case law, legislative history, or legal scholarship finding in the term "privilege" the broad meaning they would have this Court give it.

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[5] *See also* 80 CONG. REC. 8089 (1936) (remarks of Sen. Pope):

> Privileges, indemnities, bids, offers, puts, calls, etc.: These are true option contracts wherein, for a relatively small money consideration, the buyer of a privilege or indemnity obtains the right, during the next day (in the case of daily privileges) or during the next week (in the case of weekly privileges) to buy or sell, as the case may be, a stated amount of a given commodity for future delivery at a then stipulated price. A privilege contract giving the buyer the right to sell is called a "bid" or a "put," and the right given to buy is called an "offer" or a "call."

Moreover, petitioners' argument would sweep too broadly. If IP's are index "privileges," then stock index futures would also be "privileges" under SEC jurisdiction. Since the SEC and the CFTC jointly urged Congress to provide the CFTC exclusive jurisdiction over stock index futures, "privilege" cannot have the undefined breadth that petitioners imagine.

II. THE DECISION BELOW WILL NOT STIFLE INNOVATION.

Petitioners inaccurately claim that the Court of Appeals' decision is significant as a policy matter because it will stifle innovation in the securities markets. In the first place, IP's are not truly innovative. As demonstrated above, an IP is just a stock index futures contract wrapped in a different label. Moreover, the Court of Appeals' decision does not prevent IP's from being traded in the United States.[6] If PHLX and AMEX proposed to trade IP's on their affiliated futures exchanges and subject to CFTC jurisdiction, the CFTC has indicated publicly that it sees no impediment to expedited approval of IP's trading under the Commodity Exchange Act. 136 CONG. REC. S1991 (daily ed. March 1, 1990) (reprinted speech by CFTC Chairman Wendy L. Gramm).

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[6] The IP's traded on the Toronto Stock Exchange, to which AMEX refers (AMEX Pet. at 15 n. 18), bear no resemblance to the IP's involved in this case. The Toronto IP's ("TIP's") are based on the Toronto 35 Index and constitute actual ownership units of a trust which in turn owns the stocks underlying the index. Actual dividends paid on the underlying stocks are accumulated by the trust and paid quarterly to the TIP owners. Owners of a sufficient volume of TIP's may redeem them for the underlying stocks at any time. *Investor's Daily*, March 19, 1990, at p. 11. These features were specifically introduced to distinguish TIP's from petitioners' IP's and ensure that TIP's are equity products and not futures. *Wall Street Letter*, August 7, 1989, at p. 8.

In the many months since the Court of Appeals' decision, PHLX and AMEX have not sought CFTC approval. Their failure to pursue IP's trading is explained by AMEX in two ways. First, since there is a larger group of registered securities salesmen than futures salesmen, the securities exchanges refuse to apply for CFTC approval of IP's. AMEX Pet. at 14. The size of the sales force, however, is not a principled basis for assigning regulatory jurisdiction. In any event, the CFTC has said it will consider cross-registering the securities salesmen under the Commodity Exchange Act for the purpose of trading IP's as futures. *See* 136 CONG. REC. at S1991. Second, many investors cannot by law or contract trade futures so IP's should not be considered futures. AMEX Pet. at 14. Disguising a futures contract as an IP in order to slip it by otherwise applicable legal restrictions is unsound policy at best, and no reason to narrow the definition of a futures contract.

The Court of Appeals properly refused to adopt these arguments:

> An instrument either is or is not a futures contract. If it is, the CFTC has jurisdiction; if it is not, the CFTC lacks jurisdiction; if the CFTC has jurisdiction, its power is exclusive. App. 21.

Similarly, the Court of Appeals refused:

> . . . to put a thumb on the scales, enlarging the category "securities" while shrinking the category "futures" because of the exclusivity clauses in the CEA: if both categories expand, then the SEC's jurisdiction shrinks. We do not conceive it our function, however, to invent counterweights to statutes; judges should be interpreters rather than sappers and miners. *Id.* at 24.

Finally, petitioners' concern that the Court of Appeals' decision is the death knell of new securities instruments

is belied by the New York Stock Exchange's new Exchange Stock Portfolio ("ESP"). The ESP is a true market basket since purchasers of the ESP own the stocks in the ESP basket.[7] Neither the CFTC nor respondents objected to the ESP because it is not a futures contract under the well-settled principles adopted by the Court of Appeals. Thus, the Seventh Circuit's decision has not stymied innovative securities instruments at all.[8]

III. CONGRESS IS CURRENTLY ADDRESSING THE JURISDICTIONAL ISSUE RAISED IN THIS CASE.

From the very creation of the CFTC, the securities industry has been fighting against CFTC control of futures contracts on financial instruments. Congress enacted the CFTC Act in 1974 and established broad CFTC jurisdiction over futures. The legislative history of the Act demonstrates that the CFTC was created "to fill all regulatory gaps—to regulate trading in futures and in options relating to commodities or commodity futures, because such trading is now poorly regulated if it is regulated at all." 120 CONG. REC. 34736 (1974) (Rep. Poage, Chairman of the House Agriculture Committee). Yet, in late 1974, when "the ink was barely dry" on the CFTC Act, the SEC proposed legislation that would have removed the CFTC's exclusive jurisdiction over futures, but Congress

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[7] *See* "NYSE Sets S&P 500 Product," *Chicago Tribune*, June 2, 1989, Sec. 3, p. 5.

[8] Moreover, as one commentator has recently noted, "handing futures regulation over to the SEC is no guarantee of innovation. The CFTC-regulated exchanges have been far more creative than the financial institutions regulated by the SEC." *Business Week*, April 16, 1990, at p. 100.

took no action. 2 Johnson & Hazen, Commodities Regulation § 437 (2d ed. 1989) at 267. In 1978 the SEC asked Congress to transfer all jurisdiction over financial futures from the CFTC to the SEC, but Congress again refused because it wanted to preserve the "economic expertise" of the CFTC over futures trading and avoid duplication of regulation over futures markets. *Id.* at 267-268; *see also* H.R. Rep. No. 1181, 95th Cong., 2d Sess. 13 (1978) (House Agr. Comm.); S. Rep. No. 95-850, 95th Cong. 2d Sess. 22-23 (1978) (Sen. Agr. Comm.).

This running dispute resulted in earlier jurisdictional litigation similar to this case. *See Chicago Board of Trade v. SEC*, 677 F. 2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). That case became moot with the enactment by Congress of the Johnson-Shad Accord legislation which preserved CFTC exclusive jurisdiction over financial futures and, specifically, stock index futures.

Congress now is considering a number of proposals to address the CFTC-SEC jurisdictional issues.[9] Congress gave the CFTC exclusive jurisdiction in order to oust the SEC from regulating stock index futures, like IP's. If Congress decides that policy decision was sound, Congress will not revise the statute. If Congress decides that policy decision was unsound, Congress can revise the statute as it has done in the past. This Court need not and should not.

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[9] *See, e.g.*, 136 CONG. REC. E988-989 (daily ed. April 4, 1990) (remarks of Rep. Eckart); 136 CONG. REC. E983-985 (daily ed. April 4, 1990) (remarks of Rep. Glickman); 136 CONG. REC. S3205-3206 (daily ed. March 26, 1990) (remarks of Sen. Dixon); and 135 CONG. REC. S15379 (daily ed. November 9, 1989) (remarks of Sen. Gorton).

CONCLUSION

For the above reasons, the CME and Board of Trade ask the Court to deny the petitions.

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